Supreme Court, U.S.
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No. 95-376

In The

Supreme Court of the United States

October Term, 1995

UNISYS CORPORATION,

Petitioner,

v.

GERALD E. PICKERING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents would restate the questions presented by the Petition as follows:

1. May a breach of fiduciary duty claim be maintained under ERISA where:

(a) the applicable summary plan descriptions ("SPDs") stated expressly, and without qualification, that the duration of retiree medical benefits was for life, but reservation clauses elsewhere in the SPDs stated that the company reserved the right to terminate the plans;

(b) company representatives affirmatively, repeatedly and systematically misinformed employees that once they retired, their medical benefits would continue for life; and

(c) the company knew that employees therefore believed that their benefits could not change after they retired and were making important retirement decisions based upon this belief?

2. Does ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorize ERISA plan participants to obtain equitable relief to remedy the harm they suffer from an employer's breach of the fiduciary duty not to misinform them about terms of the plan?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Gerald E. Pickering, et al., respectfully request that the Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

On November 3, 1992, Petitioner Unisys Corporation ("Unisys") announced that it was terminating, effective January 1, 1993, the health benefit plans under which it and its predecessors (the Sperry and Burroughs Corporations) had provided medical coverage to retired employees and their eligible dependents. Respondents are retirees of Sperry and Unisys who retired between 1969 and April 1, 1989 under 75 different benefit plans established and maintained by Sperry Corporation (and then Unisys) through 1992 ("Retirees"). They have challenged Unisys' termination of their benefits under ERISA on the ground that Sperry and then Unisys promised them that their benefits would continue for life without change. They assert causes of action based on breach of plan terms/contract, breach of fiduciary duty, and equitable estoppel. The district court dismissed the contract and estoppel claims on the ground that Unisys had effectively reserved the right to change or end the plans at any time. It sustained the claim of fiduciary breach. The court of appeals affirmed these rulings in all respects.

Unisys petitions for a writ of certiorari from the court of appeals' interlocutory decision, on certification under 28 U.S.C. § 1292(b), upholding the claim of fiduciary breach. This brief opposes Unisys' petition. Together with this opposition brief, the Retirees are filing a conditional cross-petition for a writ of certiorari to obtain review of the court of

appeals' decision on the Retirees' consolidated appeal relating to the contract and estoppel claims.

Factual Background

Unisys systematically misinformed the Retirees in this case that their medical benefits would last "for life" when they retired, even though, according to rulings of the courts below, the company had reserved the right to end these benefits at any time. Unisys conveyed this misinformation in a pattern of unqualified written and oral assurances that the district court found so regular and pervasive as to constitute a "systematic campaign of confusion" (App. 96a). Unisys does not dispute that it gave these assurances, and continued to give them, despite its knowledge that: (a) the misrepresentations were leading employees to believe that the health benefits in effect when they retired would continue for life without change; and (b) employees were making retirement decisions based on this belief. (App. 9a & n. 6, 19a & n. 15, 20a & n. 16, 21a, 83-84a).

Each of the Sperry plans stated without qualification that, upon an employee's retirement, his medical benefits would continue for life. The earliest of the "lifetime" plans, issued in 1969, stated:

> When you retire . . . the . . . coverage then in force for you and your eligible dependents will be continued at no cost to you for the rest of your life.

(A3120 [record below], 1969 Sperry Division summary plan description). By 1980, similar plans and plan language were adopted throughout the company:

> Coverage At Retirement
>
> . . . Coverage will continue for you and your Eligible Dependents throughout your lifetime and for the lifetime (or until remarriage) of your spouse.

(A2780-81, 1982 Univac summary plan description).

Provisions reserving the right to change or end the plans appeared elsewhere in the plans. Beginning in 1982, these provisions were separated from the lifetime language by more than 80 pages without any cross-reference or other warning. See, e.g., App. 37a, 47a. The standard reservation of rights provision ("ROR") stated: "The Company expects to continue the Plans, but reserves the right to change or end them at any time." (App. 37a). The reservation provisions did not state that the reservation applied after retirement or that it overrode the unqualified promises of lifetime benefits which were stated elsewhere in the SPDs.

The district court found that officials at all levels of the company repeatedly and systematically assured employees that, despite the RORs, the benefits in effect when they retired would continue for the rest of their lives. (App. 79-80a). At the trial, the Retirees presented evidence to this effect from more than 50 witnesses. The district court found:

> This is not a case where one or two low-level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the Sperry

> organization, by all levels of management, in writing and verbally.

(App. 80-81a; see also App. 83a) The court's "sampling" of the evidence presented at trial (App. 84a nn. 68-69) included the following examples of written and oral assurances:

> You remain eligible for the [post-retirement medical] plan throughout your lifetime . . . Sperry will pay the full cost of your coverage under the Plan.

(A2762, Medflex post-retirement medical brochure, cited at App. 84a n. 68);

> [W]hichever [plan, Medflex or pre-Medflex] you take, you have to remember it's going to be for a lifetime.

and

> [You and your wife will] be guaranteed medical insurance as long as [you] live.

(A8235, A8271, assurances from benefits counselors, cited at App. 84a n. 68);

> Now, the basic hospital-surgical-medical *and* major medical coverages will continue for your life and the life of your spouse, providing you terminate on or after June 19, 1979 . . . This coverage is provided at no cost to you.

(A3615, 1979 letter to employees from Sperry Division President, cited at App. 84a n. 68);

> Don't worry, they would not have offered the program, okay in this manner, shape or form, leaving the medical intact, if their intention was to take it away from retirees. They would just not. They'd tell you that you weren't going to be able to go with it. So I wouldn't even think twice about it. And I mean

> that sincerely . . . [y]ou go with the medical and you have that, as far as I'm concerned, for life, okay . . . Same as you have now.

(A4673, Transcript from audiotaped Pre-retirement Seminar 1986, cited and quoted in part at App. 97a n. 76).

The district court also cited testimony from company executives, including: (1) one Human Resources Vice President who instructed his staff to tell employees that once they retired "[the Company's medical benefits promise] was a lifetime financial security that they could depend on" (App. 56a); (2) another who testified to

> discussions [with employees] . . . how does that impact us with respect to our plans following retirement. Will that be changed? Will you modify those? And, no whatever. Whatever. Whatever was in effect remains in effect . . . .

(App. 84a n. 69; see also App. 59a); and (3) benefits counselors who told inquiring Retirees that:

> [the ROR] pertained to active employees and not to the retirees. That . . . once they received their medical benefit, they would be continued for their lifetime and their spouse's lifetime.

(App. 84a n. 69) and that their post-retirement medical benefits were "guaranteed to them for life." (*Id.*)[1]

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[1] The same message, moreover, was confirmed for employees by the company's practice. The company never reduced the medical benefits of employees who had already retired, even when it implemented reductions in retiree benefits for active employees who would retire in the future. (App. 79a). Employees who had already retired were not affected by these reductions, and continued, through 1992, to be covered by the various plans under which they retired. (*Id.* and App. 33a).

Finally, the district court found that the company *knew* the effects of its misstatements. It knew that its employees believed that once they retired their benefits would continue for life without change.

> It is clear that the highest levels of corporate management at Sperry, and later Unisys, recognized that employees might be under the . . . belief that "lifetime" meant forever.

(App. 83a). The company also knew that employees were making retirement decisions based on this belief. One top-level manager acknowledged, for example, that a "change to Post-Retirement Medical coverage can be a powerful motivation to certain employees who have considered retirement . . . but have not yet reached their final decisions" (A4088); and that a desire to avoid the benefit changes of a new plan "can tip the scale for those who were considering retiring and may accelerate their decision to do so. . . . " (A4085). According to Sperry's Senior Vice President for Personnel:

> We said this is yours for life. You have got it for life. And people made decisions on that. They decide whether to go [*i.e.*, retire] or not go on the basis that they were told this is life.

(App. 39a n. 19).

Employees accelerated their retirements based on the company's assurances (as the company knew they would) and thereby gave up salary and pension accruals that they would have earned if they had continued to work. (App. 154a n. 20). For example, George Rieger, who retired in 1984 in response to a voluntary layoff solicitation shortly before Unisys replaced his medical plan with a new, less generous plan, was

first assured by a benefits counselor, and in writing by the Human Resources Vice President, that if he volunteered for retirement his medical benefits would be provided for life under the plan in effect on the date he retired, and not the new plan. (Tr. A2532 [133], A3810). When Rieger asked whether there was any risk that his medical benefits could be changed after retirement, the Human Resources Vice President told him, "Once you retire and take your first pension check from the company . . . that's it," (Tr. A2534-35), and that by volunteering to retire he would protect himself "from any kind of a potential change that could result in a lesser medical coverage benefit than I now have." (Tr. A2532 [135]) This assurance was "vital" to Rieger's decision to volunteer to retire. (Tr. A2536 [148]; see also Tr. A2533-36 [137, 141-42, 145-48])

The Proceedings And Decisions In The District Court

Early in the case, Unisys filed a motion seeking entry of summary judgment based on the RORs. The district court granted the motion on the Retirees' breach of fiduciary duty and estoppel claims, but denied summary judgment on the contract claim. In explaining its ruling on the contract claim, the district court observed that: "the written promise of 'lifetime benefits' has powerful meaning to retiring employees" (App. 113a n. 13); the internal inconsistency between the unqualified, specific lifetime promises and generic RORs made the plans facially ambiguous (App. 111a, 115a); and a trial on the extrinsic evidence was required to resolve the ambiguity (App. 115a).

The case was then tried to the court. After trial, the district court reversed its position on both the contract and

breach of fiduciary duty claims, entering judgment against the Retirees on the contract claim and reversing its earlier dismissal of the breach of fiduciary duty claim. The district court reversed its position on the contract claim because it understood the court of appeals' decision in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), later *rev'd on other grounds*, 115 S.Ct. 1223 (1995), which was handed down during the trial, to require it to do so. "The *Curtiss-Wright* decision," the district court wrote, "suggests that there is nothing inconsistent about having lifetime language and a ROR in the same document. . . . I now conclude that my original analysis on this point was incorrect." (App. 71a, citation omitted). The district court read *Curtiss-Wright* to establish a *per se* rule that an ROR always "trumps" a promise of lifetime benefits, thus rendering the Sperry plans unambiguous as a matter of law.[2]

On the breach of fiduciary duty claim, the court granted reconsideration of its original grant of summary judgment based on the court of appeals' intervening decision in *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), which also was decided during the trial. Based on *Bixler*, the district court concluded that the Retirees' proof of a "systematic campaign of confusion" by the company about the duration of retirement benefits (App. 96a) supported the Retirees' claim of fiduciary breach. (App. 83a).

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[2] The court reached this conclusion despite its findings that what the company did communicate systematically led employees to believe that benefits were guaranteed when they retired. At the same time, the district court declined to reconsider its dismissal of the Retirees' estoppel claim, even though that claim was based on the same pattern of misrepresentations that supported the breach of fiduciary duty claims. (App. 86a).

The Court Of Appeals' Decision

The court of appeals affirmed the district court in all respects. In upholding reinstatement of the Retirees' breach of fiduciary duty claim, the court affirmed the district court's "detailed and well supported findings" (App. 20a) that: (1) Unisys knew that its employees believed the assurances of lifetime benefits they had been given; (2) employees were making retirement decisions based on their understanding that the benefits in effect when they retired would continue for life; (3) Unisys executives were aware that the lifetime medical benefit was an important consideration for employees who were considering when to retire; (4) Unisys knew that employees accelerated their retirement plans because of the belief that by retiring at a certain point in time they would "lock in" the lifetime coverage that they had under the current plan; and (5) despite its knowledge that retirees were electing to retire based on this understanding, Unisys failed to correct the misinformation, and instead reinforced the misinformation by continuing to repeat the assurances that benefits in place upon retirement would continue for life. (App. 20a). Summarizing the district court's findings as follows:

> . . . . The district court found that the company, both actively and affirmatively, systematically misinformed its employees about the duration of their benefits by stating over and over again, without qualification, that their benefits would continue for life . . . [and] consistently responded to specific inquiries about whether a retiree's benefits could change by telling employees that they could not.

(App. 21a), the court concluded that the record clearly supported the Retirees' claim for breach of fiduciary duty.

On the contract claim, the court adopted the company's interpretation of the plans as one compelled by law, holding that the specific, lifetime language was necessarily limited by the RORs. The court of appeals did not actually conclude that the Retirees' interpretation – that the lifetime language limited the RORs – was not reasonable. The court held instead that "[t]he presence of lifetime language and the reservation of rights clauses here did not *necessarily* render the . . . plans ambiguous" (App. 147a n. 11, emphasis added), and concluded that "[w]here . . . the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits" as a matter of law. (*Id.*).

The court of appeals also affirmed the district court's analysis of the extrinsic evidence. In affirming the district court's conclusion that the "lifetime promises" in the plans did not manifest an intent on the part of the company to vest benefits, the court relied primarily on the company's use of the word "vested" in its medical plan for its top level executives, but not in the rank and file plans. (App. 151a).[3]

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[3] The court explained its refusal to consider the evidence of what the company actually communicated on the ground that such evidence "cannot be used to contradict the unambiguous written terms of an ERISA plan." (App. 152a n. 16). It did not explain why, however, it was proper to consider Unisys' proffered extrinsic evidence of what the company intended but did *not* disclose to employees.

The court of appeals also affirmed the district court's rejection of the Retirees' estoppel claims. The court found that Unisys had materially misrepresented the plan (App. 154a n. 20), knowing that employees were misled into believing that their benefits were not subject to change after they retired and were retiring based on this belief (App. 154a), but rejected

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW APPLIES SETTLED LAW THAT ERISA PLAN FIDUCIARIES MAY NOT MISLEAD OR MISINFORM EMPLOYEES ABOUT PLAN BENEFITS.

The facts of this case are extraordinary. However, the governing legal principles are well established. There is no controversy among the courts of appeals about the appropriate ERISA fiduciary standards to apply, nor about their application to the unusual facts of this case. The decision of the court of appeals does not warrant review by the Court.

The facts, which Unisys studiously avoids, establish that Unisys actively misinformed its employees that their medical benefits were guaranteed for life once they retired. In fact, the lower courts have concluded, the benefits were subject to change at any time and the company knew that employees were making important retirement decisions based on the misinformation.

The applicable law is uncontroversial. This Court has clearly held that the strict trust law fiduciary standards of loyalty and care apply to ERISA fiduciaries in their dealings with plan participants. *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 & n. 10 (1985) ("[R]ather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts . . . ."; ERISA imposes "strict standards" on fiduciaries); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101,

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the Retirees' estoppel claim because of its conclusion that the plans reserved the right to terminate the benefits. (App. 155a).

109-10 (1989); 29 U.S.C. § 1104(a); G. Bogert, *Trusts*, § 96 at 348, 350 (6th ed. 1987). These standards were imposed "[t]o help fulfill ERISA's broadly protective purposes," which include safeguarding "the continuing well-being and security of millions of employees and their dependents." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S.Ct. 517, 524 & n. 5 (1993), quoting 29 U.S.C. § 1001(a). The duties owed by ERISA fiduciaries are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.) (Friendly, J.), *cert. denied*, 459 U.S. 1069 (1982).

Every court of appeals that has addressed the question has agreed that ERISA fiduciaries may not mislead those to whom they owe the duties of loyalty and care.[4] The decision

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[4] *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 702 (1st Cir. 1994); *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 669 (2d Cir. 1994); *In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, 57 F.3d 1255, 1261-62 (3d Cir. 1995); *Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 986 (3d Cir. 1995); *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130, 133-35 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993); *Berlin v. Mich. Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Drennan v. General Motors Corp.*, 977 F.2d 246, 251 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2416 (1993); *Anweiler v. American Elec. Power Service Corp.*, 3 F.3d 986, 991 (7th Cir. 1993); *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Howe v. Varity Corp.*, 36 F.3d 746, 753-54 (8th Cir. 1994), *cert. granted*, 115 S. Ct. 1792 (1995); *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984); *Barker v. American Mobil Power Corp.*, 1995 U.S. App. LEXIS 25259 at *16-17 (9th Cir. Sept. 8, 1995); *Maez v. Mountain States Tel.*, 54 F.3d 1488, 1500-01 (10th Cir. 1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991); *Local Union 2134 v. Powhatan Fuel, Inc.*, 828 F. 2d 710, 713-14 (11th Cir. 1987); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990).

below correctly applies this well-settled law and there is no uncertainty or conflict among the circuits which requires review by the Court.

H. THE UNIQUE AND UNDISPUTED FACTUAL RECORD OF THIS CASE SHOWS THAT THE COMPANY ENGAGED IN A CONTINUING, SYSTEMATIC PRACTICE OF MISREPRESENTING BENEFITS TERMS TO EMPLOYEES. THE DECISION DOES NOT IMPOSE ANY NEW REQUIREMENTS ON EMPLOYERS.

Contrary to Petitioner's claim, this is not a case about an employer's passive or unwitting breach of a "duty to remind" employees about information that has been clearly and adequately disclosed in an SPD. (Pet. 12). This case instead concerns a fiduciary's duty not to actively misinform employees through material misrepresentations and incomplete, inconsistent, and contradictory disclosures. (App. 16a). Based upon the striking but undisputed facts of this case, the court of appeals correctly ruled that Unisys' knowing conduct constituted "a breach of that duty in its most basic form." (App. 17a).

Unisys finds no support for its conduct in this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995),[5] or in any of the court of appeals decisions cited

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[5] *Curtiss-Wright* concerned disclosure duties under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), and did not address the general fiduciary duties under § 404(a), 29 U.S.C. § 1104. The court of appeals correctly held that satisfaction by a plan administrator of its minimum statutory disclosure obligations does not foreclose liability when the administrator breaches its fiduciary duty to communicate truthfully to plan

in its petition (Pet. 15 n. 14). The ruling below is not in conflict with these decisions. First, these decisions do not begin to suggest that Unisys is insulated from liability for knowing misrepresentations because it also included reservation provisions in the statutorily required SPDs. Unlike the "duty to remind" case hypothesized by Petitioner, the record here shows a "systematic campaign of confusion" about the meaning of the SPDs (App. 96a, 154a n.20). Although there were RORs in the SPDs, the SPDs also described the benefits as lasting "for life". Petitioner went further and voluntarily undertook to reinforce the unqualified promises of lifetime benefits found in the SPDs through its repeated and systematic misrepresentations. The company knew that the misrepresentations were misleading employees into believing that their benefits could not be changed once they retired. ERISA does not provide, and this Court did not hold in *Curtiss-Wright*, that a fiduciary is free to actively misrepresent benefits. Indeed, no court has ever held that if a fiduciary makes minimum statutory disclosures through distribution of an SPD containing an ROR, it can then proceed to misrepresent plan terms systematically and knowingly to participants.

Second, voluntary and active misconduct is the basis for Unisys' liability, not an innocent failure to remind employees about a clear provision in an SPD. The court of appeals did not impose a new disclosure obligation on employers. It simply applied well-established law that Unisys' knowing and pervasive misrepresentations violated ERISA's strict fiduciary standards.

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participants by making simultaneous or subsequent material misrepresentations, as Unisys did in the present case. (App. 16a).

Third, Unisys' plea that it merely failed to remind employees about what was in the SPDs is particularly untenable given the record of this case. The SPDs themselves did not make a clear disclosure that the company's supposed right to amend or terminate benefits applied after the employee had retired, especially given the company's pervasive misrepresentations to the contrary. The record showed that:

(1) the relationship between the plans' express, unqualified lifetime language and the RORs was not clear to the average Sperry employee,[6] or to benefits counselors whose job it was to explain the plan, company Human Resources Vice Presidents to whom those counselors reported, or executives at the highest levels of the company, *and Unisys knew this*;

(2) the district court recognized when it first construed the plans that the Retirees' interpretation was plausible and that the unqualified lifetime statements made the SPDs ambiguous;

(3) Unisys' key witness admitted at trial that the SPDs were unclear and potentially misleading to employees (Tr. A2667-69); and

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[6] The lifetime language in the plans was free-standing and unqualified. The RORs appeared only in the back of the booklets, as much as 80 or more pages from the lifetime promises, and without any cross-reference or direction to employees that they governed the lifetime benefits of existing retirees. Under ERISA's disclosure rules, SPDs must be "written in a manner calculated to be understood by the average plan participant", 29 U.S.C. § 1022(a)(1). But the SPDs here were not. They instead had "the effect [of] misleading, misinforming or failing to inform" employees and did not include the required "clear cross references" to limitations on benefits described "in a manner not less prominent than" the promise of lifetime benefits, 29 C.F.R. § 2520.102-2(b).

(4) the district court, in concluding that the company did intend the ROR to apply to existing retirees, relied almost exclusively upon the subjective beliefs of a few company executives that were never disclosed to employees.

Finally, the court of appeals' decision does not conflict with the principle that a written ERISA plan may not be modified by oral statements or informal amendment. The cases cited by Unisys in support of this argument (Pet. 16-17) are inapposite. In each case, the plaintiff asserted a contractual right to benefits based on alleged oral modifications of a written agreement. In none of those cases did the plaintiffs prove systematic misrepresentations that the employer knew were causing employees to misunderstand the terms of the plan.

III. THERE IS NO REASON TO HOLD THE PETITION PENDING THE COURT'S DECISION IN *VARITY CORP. v. HOWE*. THE CASES ARE FACTUALLY DISSIMILAR AND RAISE UNRELATED QUESTIONS.

There is no reason to hold the petition in suspense pending the decision in *Varity Corp. v. Howe*, No. 94-1471, much less hear this case "in tandem" (Pet. 11) with it. Resolution of the questions on which certiorari was granted in *Howe* will not likely have any effect on the outcome of this case.

The threshold question in *Howe* is whether the employer's actions in inducing employees to accept transfer to a new, insolvent affiliate is governed by ERISA's rules of fiduciary conduct for plan administrators, or instead by state law. (See Br. of Petitioner Varity Corp. 29-41; Reply Br. of Varity Corp. 10-14; Reply Pet. for Cert. of Varity Corp. 3-4).

The Court's decision on this question in *Howe* will have no bearing on this case, because Unisys has never disputed or sought review of the conclusions of the courts below that its conduct explaining the nature and duration of the retiree medical benefits was fiduciary conduct governed by ERISA. See App. 11a n. 9. Although Unisys is suggesting for the first time in its petition that its conduct explaining benefits was not governed by ERISA (Pet. 12 n. 11), this argument was not raised in either court below. Indeed, Petitioner uniformly asserted in its Answers that ERISA preempted all state law claims, and the district court so ruled without protest by Petitioner. (App. 117a). Petitioner cannot argue now that its conduct was not governed by ERISA. See *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n. 5 (1994); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981). Thus, the ruling on the fiduciary status of Varity Corporation in misrepresenting the business prospects of the new affiliate will not apply to this case.

In addition, the employer conduct at issue in *Howe* is quite different from the employer conduct at issue in this case. Petitioner itself concedes that *Howe* "arises from a distinctly different set of facts." (Pet. 11). Similarly, Varity Corporation distances itself from this case by emphasizing that it engaged in no misstatements about the nature of the benefits themselves, there is no finding of any company representation that benefits would continue for life or for any particular length of time, and there is no dispute that a reservation of rights was adequately disclosed. (Br. for Petitioner Varity Corp. 8; Reply Br. 13 & n. 16). Thus, even if the Court concludes that Varity's conduct was governed by ERISA fiduciary standards, the ruling on the legality of that

conduct will not apply to petitioner's distinctly different conduct in systematically misleading employees with affirmative, unqualified promises of lifetime benefits which it knew to be untrue.

The second question on which review has been granted in *Howe* is whether individual plan participants and beneficiaries may obtain relief for an ERISA plan administrator's breach of fiduciary duty which harms them but not necessarily the plan as a whole. With one exception, all of the courts of appeal which have ruled on this point have agreed that the broad, unqualified language of ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes such relief.[7]

The only circuit in which this rule is not entirely settled is the Ninth Circuit, which adopted a rule that relief for fiduciary breaches may run only to the plan or to all participants. See *McLeod v. Oregon Lithoprint Inc.*, 46 F.3d 956,

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[7] *See In re Unisys Corp. Retiree Med. Ben. "ERISA" Litig.*, *supra*, 57 F. 3d at 1267-68; *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, *supra*, 12 F.3d at 1298-1300 (equitable relief is available to individual under § 502(a)(3) for misleading information); *Anweiler v. American Elec. Power Service Corp.*, *supra*, 3 F.3d at 993 (equitable relief may be granted to individual participant under § 502(a)(3) for breach of fiduciary duty in failing to disclose that reimbursement agreement was voluntary); *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 230 (7th Cir. 1990) (ERISA § 502(a)(3) may impose liability on a fiduciary that runs directly to the beneficiary); *Howe v. Varity Corp.*, *supra*, 36 F.3d at 754-55 (rejecting employer's argument that § 502(a)(3) claims can only be brought on behalf of a plan and cannot inure to the participants' benefit; participants cannot collect monetary damages as such, but they may obtain full range of individual equitable relief, including restitution); *Eddy v. Colonial Life*, *supra*, 919 F.2d at 750. *See also Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1336 (5th Cir.), *cert. denied*, 113 S.Ct. 812 (1992) (acknowledging that § 502(a)(3) affords equitable relief to participants for fiduciary breaches).

959 (9th Cir. 1995); *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417-18 (9th Cir. 1991). However, in neither case did the participants seek equitable relief for misrepresentations; instead, they sought compensatory damages (*McLeod*) or benefits due if discretionary authority were exercised in their favor (*Horan*). In other cases where the relief sought was equitable, the Ninth Circuit allowed participant-related relief for a breach of fiduciary responsibilities under ERISA §§ 502(a)(3) and 409. It required that a company make restitution to the plan for the breach of fiduciary duty and ordered that participants be paid under a constructive trust. See *ACTWU v. Murdock*, 861 F.2d 1406, 1416-17 (9th Cir. 1988); *Waller v. Blue Cross of Cal.*, 32 F.3d 1337 (9th Cir. 1994). In its most recent decision, the Ninth Circuit has taken another step to limit the rule barring relief for harm to individual participants. In *Barker v. American Mobil Power Corp.*, *supra*, the court ruled that relief may be available for a breach of fiduciary duty which affected only two remaining plan participants. 1995 U.S. App. LEXIS at *4 & n.1, 22-24. Thus, the vitality of any supposed bar to individual relief in the Ninth Circuit is open to doubt.

The conclusion that ERISA affords individual plan participants recourse for fiduciary breaches that harm them follows from the plain words of § 502(a)(3), the structure of the entire statute and the very purposes of ERISA. In further support of the court of appeals' decision on this point, Respondents respectfully adopt and incorporate the arguments set forth in the briefs filed in *Howe* by respondents and *amici* the United States, the National Employment Lawyers Association, and the American Association of Retired Persons.

Assuming that this Court rules in *Howe* that the employer's conduct was governed by ERISA, then the Court may address the availability of individual relief for fiduciary violations under § 502(a)(3). However, the court of appeals' decision in this case could be affected only if the Court in *Howe* were to endorse the extreme minority view among the circuits and hold that ERISA plan participants have no individualized remedies for violations of fiduciary duties which harm them. In this event, which Respondents respectfully view as unlikely, the courts below on remand from this interlocutory appeal can readily implement any ruling on the scope of § 502(a)(3). Indeed, they would be bound to do so without specific direction from this Court. To hold the petition in suspense pending the decision in *Howe* would not be useful.

CONCLUSION

The decision of the court of appeals is based on a unique factual record and correctly applies well-settled principles of the law governing ERISA fiduciaries. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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